LIM SEO v. REGINA

[A. Cr. J. (Rose C.J.) August 8, 1962]

[Singapore — Magistrate's Appeal No. 74 of 1962]

Criminal Law and Procedure — Prosecution by sanction — Specific authorisation to prosecute — Election to prosecute under different section — Whether illegality can be cured — Public interest — Criminal Procedure Code (Cap. 132), ss.128 and 440.

Where counsel had a specific authorisation to prosecute an accused under a particular section, his justification for appearing on behalf of the Crown in Court was that authorisation. If he elected to proceed under a different section carrying a heavier maximum sentence than the one which was authorised then it was an illegality that could not be cured.

The public interest is that in any criminal matters when prosecutions are conducted by means of sanctions the provisions of the law should be observed.

MAGISTRATE'S APPEAL.

D. G. Ironside for the appellant.

Peter Lee for the respondent.

Rose C.J. (delivering oral judgment): In this case the appellant, a woman rubber tapper, was convicted under section 381 of the Penal Code of stealing some latex which was valued at 10 cents, she being an employee of the owners of a plantation.

The matter came up on appeal a month ago and a point was taken by Mr. Ironside, learned counsel for the appellant, that Mr. Peter Lee who appeared for the Crown in the matter was not properly authorised to do so. The case was then adjourned in order to enable learned counsel to meet this point for which he was unprepared. To my surprise it has taken a full month for the appeal to be restored.

What happened was that learned counsel was authorised to prosecute this woman under section 379 of the Penal Code, which carries a maximum sentence of three years' imprisonment. In fact learned counsel proceeded under section 381. It is important to note that the amendment was not made by the Court but by the prosecuting authority and therefore the case appeared as a case under section 381, which carries a maximum sentence of seven years' imprisonment.

Mr. Lee now takes the point that he need not have had an authorisation at all. That may be. I do not propose to decide that point because I do not think it arises in this case. The fact of the matter is that he had a specific authorisation to prosecute this particular woman under a particular section. That was his authorisation, that was his justification for appearing on behalf of the Crown in Court. He elected to proceed under a different section carrying a heavier maximum sentence than the one which was authorised — this point is important. This seems to me to be an illegality that cannot be cured.

At the last hearing learned counsel suggested that this ubiquitous section 440 could be called in aid but it is, I think clear that that cannot be so in view of the specific reference under section 440(b) to the want of any sanction required by section 128. This would seem to defeat any presumption of generality.

Learned counsel for the respondent has referred to the public interest. It seems to me that the public interest in this matter is quite clear. The public interest is that in any criminal matters when prosecutions are conducted by means of sanctions the provisions of the law should be observed.

When a basic mistake of the kind under consideration has been made I am unimpressed by the contention that had the requirements of the law been duly observed a conviction must inevitably have followed.

In all the circumstances of this case I think the appellant is entitled to succeed. The appeal therefore will be allowed and the conviction and sentence set aside.

Appeal allowed.

Solicitors: *D. G. Ironside; S. K. Lee.*

WONG CHEONG KIM v. DEPUTY PUBLIC PROSECUTOR

[A. Cr. J. (Rose C.J.) August 9, 1962]

[Singapore — Magistrate's Appeal Nos. 110 and 112 of 1962]

Local Government Ordinance, 1957, s.213 — Licensing of stalls — Delay in granting licence — Inference that bribe is expected — It is essential not only that an officer should be incorruptible but he should manifestly appear to be incorruptible.

Criminal Law and Procedure — Bribery and corruption — Sentence — Circumstances to be taken into account in assessing.

General observations on corrupt practices and their relevance to sentences on conviction. Need to distinguish between various forms.

MAGISTRATE'S APPEALS.

Robert Chee for the appellant.

A. W. Ghows (Senior Crown Counsel) for the respondent.

Rose C.J. (delivering oral judgment): This is a case that has caused me some concern. It appears that a gentleman called Mr. Loh Pui Kay is the Superintendent in charge of the Markets and Hawkers Department of the City Council. It is his function amongst others to consider applications for stalls and apparently as long ago as May 1961 he was approached by the present appellant in this case for one of these empty stalls. A written application, however, was not put in until the 8th of August.

Conversations, then took place in May and the written application was put in on the 8th of August. Mr. Loh himself says that there were only two applicants, the appellant and a woman whose husband already had a stall in

the same market; and that therefore his view was that the appellant should have it.

Well now one can hardly imagine a simpler problem for an administrative officer who is put in charge of these things — things that are of great importance to the people concerned, to people who are applying for licences. One would have thought that there could not have been a more simple administrative decision to be made.

But what in fact happens? Nothing had happened at all by November 21st, which is two and a half months after the application was submitted, during which time, according to the evidence both of Mr. Loh and the appellant, there were repeated conversations between the appellant and Mr. Loh as to the fate of the application. The learned District Judge states at page 27 of his grounds of decision, paragraph 6 — and he is dealing here with the evidence of Mr. Loh — that the witness stated that previous to the 21st of November, 1961 he had explained to the accused there were only two applicants for the stall and since the other applicant's husband had already a stall in the same market, he would try to recommend — I stress that phrase — he would try to recommend the appellant. I do not wish to say anything that will cause complications elsewhere but I must say that that is a phrase that seems to me to be most unfortunate for an honest official who is deciding a simple routine matter of this kind to say to a man after a considerable delay "I will try to recommend you". The Judge goes on to say that the witness had at that stage already made up his mind to recommend that this stall be allotted to the accused rather than balloted for. He had already made up his mind on a matter that, I suggest, could not possibly have taken more than a few minutes to decide; and yet he elects to inform the accused that he will "try to recommend". And, as I have said, that phrase seems to me to be most unfortunate in the circumstances.

The appellant's story is that he made repeated representations in this matter. Of course, in order to establish a defence to the charges, he says that the money that he passed was intended to be rent in advance. That I do not accept. The true position, in my view, is that he undoubtedly paid a bribe and he paid a bribe because he thought, and in my opinion not unreasonably thought, that a bribe was expected. Of course he acted wrongly. I am not suggesting that one can do that. Of course an offence has been committed. It seems to me, however, that the primary responsibility for the episode rests on Mr. Loh and not upon the appellant. Even assuming that Mr. Loh was innocent in the matter, he has in my opinion behaved with a degree of incompetence that might well lead the public to suspect that corruption exists.

On page 14 of the record there appears the following passage in the evidence of Mr. Loh himself: "I told him (the accused) on the 21st November, as I had explained to him several times before, that when his application was approved he would be informed in writing. After I had explained this he gave an envelope to me." All I can say is that, in the light of the previous history of delay, human nature being what it is, the offer of this bribe was a natural, if regrettable, sequel.

In this instance the bribe was refused. It might of course have been refused because Mr. Loh is an honest man. It might equally have been refused for less creditable reasons, for example because the amount was insufficient. The latter explanation, incidentally, would supply an explanation of the otherwise inexplicable conduct of the appellant (if Mr. Loh's version of the matter is to be accepted) in re-offering a bribe only three days after he had received a solemn warning on the 21st of November. Moreover, the appellant appears to have taken so little precaution that he not only handed the envelope to a third party (Mr. Loh being absent on account of indisposition) but actually, on request, wrote his name in Chinese characters on the right hand corner of the envelope.

The refusal of the bribe on this second occasion seems to me to have no significance, as in any event it would have been dangerous in the highest degree to accept a bribe in the circumstances in which this one was offered, i.e. through the hand of a third party.

It is, however, unnecessary to speculate on these matters as even on the assumption that Mr. Loh is innocent it is most unfortunate that he did not bear in mind that it is essential not only that he should be incorruptible but he should manifestly appear to be incorruptible.

An almost stock set-up in a corrupt department, which is entrusted with the allocation of permits, or licences or what have you is this matter of delay. A person applies for a permit of some sort — an import licence or something of that kind — or he applies for a hawker's stall. He is not refused out of hand by the corrupt official because that would be a mistake; it would be crude and also would kill the goose that lays the golden eggs. The traditional technique practised all over the world where there is corruption of this kind is for the application to be delayed; and it goes on being delayed and delayed and delayed until the patience of the applicant is exhausted. He realises that a bribe is required and then — quite wrongly of course — he pays. As I say it is a classic set-up.

I very much hope that in this case that is not the position. I hope that this is a case of incompetence and not of dishonesty, but even on that view it seems to me that steps should be taken to ensure that these duties are removed from an officer who apparently finds the work too onerous for him to perform without unreasonable delay. He evidently finds it impossible to decide these elementary questions in less than a matter of months. I suggest therefore that he should be entrusted with less onerous duties and

that these matters of the allocation of licences should be placed in the hands of people who will treat them with that expedition that the public interest demands.

As to sentence, I felt considerable doubt on this matter. I am informed that the fine has been paid and after considerable hesitation I have come to the conclusion that in all the circumstances the wisest course is to refrain from reducing it.

I would observe that learned Senior Crown Counsel has thought fit — most properly in my opinion — to withdraw the Crown's cross appeal against the insufficiency of the sentence.

In this connection I would refer to the final sentence in the learned District Judge's careful judgment which reads:

"The whole incident is all the more unfortunate in that it is clear that the accused would have got the stall if he had exercised a little more patience. This is not a case in which a person offers a bribe in order to escape the consequences of some wrong doing on his part, but is a misguided attempt to clinch an advantage, relevant to his livelihood, by corrupt means."

I entirely agree with every word of that, except that perhaps the addition should have been made that the appellant had already exercised two and a half months' patience since his written application has been submitted.

In all the circumstances the appeal must be dismissed and the conviction affirmed. The cross appeal by the State Advocate-General against the sentence must also be dismissed. The sentence in my opinion erring, if it errs at all, on the side of excess.

Appeal dismissed.

OASIS MILK BAR v. LIM TENG & ORS.

[A.C.J. (Ong J.) August 9, 1962]

[K.L. — Civil Appeal No. 4 of 1962]

Master and Servant — Summary dismissal — Refusal of servant to keep record — Whether servants liable to summary dismissal after three days delay.

The respondents were bakers employed by the appellant in a confectionery. On August 11 they were required by the appellant to keep a daily record of the quantity of butter and eggs used by them. The record required was a simple one, but they refused to comply with their employer's wishes. By their refusal the respondents rendered themselves liable to summary dismissal, but the appellant, however, only told them that if they did not want to keep the required record they might as well stop work. The appellant knew that they persisted in their refusal on the 11th, 12th and 13th but no action was taken till the 14th as their services were rendered to fulfil orders already given by customers. In the result the Asst. Commissioner for Labour held that the appellant had condoned and accepted the stand that they would keep no record and he had thereby lost his right of summary dismissal. Accordingly, he was ordered to pay them an indemnity of one month's wages in lieu of notice. On appeal,

Held: the refusal was a continued act of wilful disobedience to the lawful and reasonable order of the employer and it therefore justified summary dismissal each day the disobedience was persisted in. In the circumstances of the case the question of condonation did not arise.

CIVIL APPEAL.

K. A. Menon for the appellant.

Respondents in person.

Ong J.: In this appeal against the decision of the Junior Assistant Commissioner for Labour the only issue is whether the respondents were still liable on August 14, 1961 to summary dismissal after having been so liable three days earlier.

The respondents were three bakers employed by the appellant in a confectionery for cake-making and were rightly held to come within the definition of "labourers" under the Employment Ordinance. On August 11 they were required — and reasonably required, in the opinion of the Junior Assistant Commissioner for Labour who heard their complaint — by the appellant to keep a daily record of the quantity of butter and eggs used by them. The record required was a simple one, the respondents were sufficiently literate and capable of doing what was required, but they refused to comply with their employer's wishes. By their refusal the respondents were held to have rendered themselves liable to summary dismissal, and with this view I entirely agree.

The appellant, however, did not instantly dismiss them but only told them that if they did not want to keep the required record they might as well stop work. He also admitted he knew that they persisted in their refusal on the 11th, 12th and 13th but he refrained from taking any action till the 14th as he needed their services to fulfil orders already given by customers. In the result the Assistant Commissioner for Labour held that the appellant had condoned and accepted their stand that they would keep no record and he had thereby lost his right of summary dismissal. Accordingly, he was ordered to pay them an indemnity of one month's wages in lieu of notice.

In his judgment the Assistant Commissioner for Labour expressed his opinion as to what the appellant should have done when faced with refusal of his request. As an alternative to summary dismissal it is said that "he should have told the complainants that although they had disobeyed his instructions he would allow them to continue working until such time as he decided what to do about them and at the same time reserving his rights to dismiss them immediately after making his decision."

With respect I regret to say that the problem is not one that could be solved by applying the formula suggested or any other formula. The real question is whether the delay of three days meant that the appellant in fact withdrew his requirement that the record should be kept. If there was such a withdrawal, or his conduct during the interval was such that the same